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Recommended Citation

Brief of Respondent, *Tabish v. Smith*, No. 15014 (Utah Supreme Court, 1977).

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BETTY J. TABISH, WILLIAM OMAN,)
EUGENE TABISH and NORMAN J.)
TABISH,)

Plaintiff-Appellants,)

vs.)

Case No. 15014

DONALD SMITH,)

Defendant-Respondent.)

RESPONDENT'S BRIEF

APPEAL FROM AN ORDER OF
THE THIRD DISTRICT COURT
SALT LAKE COUNTY
HON. MARCELLUS K. SNOW, JUDGE

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FILED

MAY 12 1977

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Defendant-Respondent.)

RESPONDENT'S BRIEF

NATURE OF CASE

Plaintiff-appellants obtained a default judgment against defendant-respondent in the Third District Court on November 5, 1976 in the amount of \$2,400.00 together with \$2,400.00 in punitive damages and \$850.00 attorney's fees and thereafter on December 23, 1976 moved that the Court set aside respondent's homestead exemption in connection with appellants' attempted sheriff's sale of respondent's residence.

DISPOSITION IN LOWER COURT

The Honorable Marcellus K. Snow, District Judge, denied plaintiffs' Motion for an order setting aside defendant's homestead exemption.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the order of the District Court affirmed.

STATEMENT OF FACTS

In 1973 appellants filed a complaint in the Third District Court alleging that respondent had sold them certain parcels of land to which respondent did not hold title, thereby damaging appellants in the amount of \$2,400.00 special damages and an additional amount in punitive damages due to the fraud (R.2).

Appellants obtained a default judgment against respondent in this case on November 5, 1976 (R.18). Thereafter, in December of 1976, appellants attempted to execute upon and sell respondent's residence located in Salt Lake County (R.37). Respondent filed a homestead declaration, declaring exemptions for himself, his wife, and five children living at home pursuant to Section 78-23-1, Utah Code Ann. (1953) as amended. Appellants then made a motion for an order setting aside respondent's homestead exemption. Appellants' motion was denied by the Honorable Marcellus K. Snow (R.36).

Respondent disagrees with appellants' statement of facts insofar as it infers that Judge Snow restrained appellants from proceeding with the sale of respondent's residence. The record shows that Judge Snow restrained the appellants from the sale of certain specifically named personal property which is exempt from such sale pursuant to Section 78-23-1, Utah Code Ann. (1953) as amended (R.29).

Respondent disagrees with appellants' statement of facts insofar as it states that there is any properly introduced evidence in the record on file which specifically traces alleged funds obtained from appellants to payment of respondent's legal

expenses and house payments, or to creating or maintaining respondent's homestead.

Respondent disagrees with appellants' statement of facts insofar as it states that the lower court based its ruling on the position that "... even if appellant could prove the respondent had used appellants' money...the homestead exemption statute provided no exception which could allow the court to grant appellants' Motion..." The lower court did not state this to be its position in denying appellants' Motion (R.35,36).

ARGUMENT

POINT I

APPELLANTS' JUDGMENT DOES NOT QUALIFY UNDER ANY OF THE THREE STATUTORY EXCEPTIONS TO THE HOMESTEAD EXEMPTION

Section 28-1-1, Utah Code Ann. (1953) as amended, states the only three exceptions to the homestead exemption from judgment lien and execution or forced sale. They are:

(1) taxes accruing and levied thereon; (2) judgments obtained on debts secured by lawful mortgage on the premises and on debts created for the purchase price thereof; and (3) judgments obtained by an appropriate party on debts created by failure to provide support or maintenance for dependant children.

Appellants' judgment does not fall into any of the three exceptions. It is settled law in this state that an execution levied upon premises constituting the homestead of a judgment debtor is absolutely void, not merely voidable. Antelope Shearing Corral Co. v. Con Wagon & Mach. Co., 54 U 355, 180 P. 597.

Appellants are not entitled to set aside respondent's homestead exemption for the purpose of executing upon their judgment.

POINT II

THE FRAUD ALLEGED BY APPELLANTS DOES NOT GIVE RISE TO A CONSTRUCTIVE TRUST

There is no allegation or evidence anywhere in the record that respondent "created and maintained" his homestead with fraudulently obtained funds such as the situation in the Wiley case cited by appellants. In fact, respondent had purchased home before the alleged fraud. The proceeds of the alleged wrongful act in this case are not traceable to the establishment of the homestead, therefore, a constructive trust for the benefit of appellants in respondent's homestead cannot possibly arise under the fact situation of the present case.

POINT III

IN UTAH THE HOMESTEAD IS FOR THE BENEFIT OF THE FAMILY AND NOT THE HEAD OF THE HOUSEHOLD

Under Utah law, the homestead, being a constitutional creation, is a right which is for the benefit of the family, not the head of the family such as the respondent in this case. Payson Exchange Savings Bank v. Tietjen, 63 U. 321, 255 P. 33. The homestead law in Utah is liberally construed to make it effective for the dependent and helpless, to ensure them shelter and support. Folsom v. Asper, 25, U. 299, 71 P. 315; Panagea v. Manning, 93 U. 198, 69 P. 2d 614.

In the present case, the homestead law is for the protection of the respondent's wife and five children living at home. The judgment which the appellants have is against the respondent individually, and not against his family. Appellants must pay for their judgment from property which is not statutorily

set aside for the protection of persons such as respondent's family.

CONCLUSION

Based upon the arguments and authorities as cited herein, respondent respectfully requests the Court to affirm the order of the District Court.

Respectfully submitted,

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